

# Issues of Merit

A Publication of the Office of Policy and Evaluation, U.S. Merit Systems Protection Board

February 2003

## Director's Perspective

### Are the Government's Core Values Changing?

**W**hat is meant by the merit system principles? How does the Homeland Security Act affect those principles? How does the Merit Systems Protection Board protect those principles? What is the role of the newly authorized chief human capital officers regarding the principles?

The impending organizational changes in the executive branch make these questions especially timely. Let's start by talking about the elements that guide any organization—the principles by which organizations live, and the culture that flows from those principles and shapes behavior. Principles worked for Johnson and Johnson in 1982 when someone killed seven people by poisoning bottles of Tylenol, one of J&J's top products. Confronted with this tragedy, J&J managers used the company credo to guide their decisions. That credo states, "We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. . . . We are responsible to the communities in which we live and work, and to the world community as well. . . ."

Relying on those principles, company managers took full responsibility for responding to the crisis. They recalled every package of Tylenol from shelves around the world, despite the dramatic financial loss that decision represented. They redesigned Tylenol containers, making them tamper-proof, and even discontinued capsule production for a time. Today Johnson & Johnson's market share is solid and its stock value steady. Living by its

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### Category Rating Arrives

**T**he Board has argued for it since the mid-1990s and now it's here: category rating.

Thanks to a provision of the Homeland Security Act, agencies will soon have the option of replacing the problematical Rule of Three with category rating. This is a way to refer job candidates that avoids the counter-productive limitations imposed by the Rule of Three. The process allows managers to select *any* person from a top category rather than requiring them to select one of the three top candidates on a list arranged by numerical scores.

The process is not new. Two organizations in the Department of Agriculture began applying category rating in 1990 as part of a demonstration project. The approach was successful and was made permanent in the USDA organizations where it had been tested. It also is used by the IRS and several Defense Department laboratory demonstration projects.

Here's how it works: Instead of assigning job applicants discrete numerical scores and referring them in score order (after adding 5 or 10 points for those eligible for veterans preference), qualified applicants are assigned to a cat-

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### OPE Focus on the Facts

#### Belief:

Federal employees covered by the Federal Employees Retirement System (FERS) are generally younger than those covered by the Civil Service Retirement System (CSRS), so the number of FERS employees who are eligible for voluntary retirement is small compared to the number eligible under CSRS.

#### Fact:

The number of FERS employees eligible for voluntary retirement is nearly 80 percent of the number eligible under CSRS — 106,054 FERS eligibles versus 133,867 CSRS eligibles. There are now almost twice as many employees under FERS as under CSRS—61 percent in FERS versus 33 percent in CSRS, with 6 percent in other systems.

(Excludes U.S. Postal Service.)  
Source: OPM Factbook 2002

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principles, even in the face of what could have been financial disaster, saved the product and may have saved the company.

The federal government, too, has a credo—the merit principles, codified by Congress in title 5 of the U.S. Code. These are statements of the core values that guide the HRM actions and decisions of the executive branch agencies, including the roughly half of government agencies that are in some way exempt from title 5, such as the IRS, FAA, parts of the VA and the Public Health Service, and others. Congress considered these principles of fairness and merit so important that it forbade the new Department of Homeland Security (DHS) to “waive, modify, or otherwise affect” the merit principles. Thus, the new department must abide by the same core values as other executive branch agencies. Additionally, the department is not permitted to tamper with the provisions of title 5 that relate to prohibited personnel practices.

It is clear that the law intends the new department to honor the same core values as the rest of the executive branch. The underlying beliefs and concepts expressed in the merit principles will continue at Homeland Security as they have in the many demonstration projects and agencies exempt from traditional title 5 processes and procedures. The Merit Systems Protection Board's responsibility for protecting merit principles will extend to the new organization through our statutory research and studies function as well as through the role given the Board by the Homeland Security Act. That law requires OPM and DHS to consult with the Board in devising appeals procedures so that DHS employees are assured of due process

protections. But even if adjudicative processes change with respect to the new department, MSPB's role continues to be one of overseeing the policies and practices that affect merit principles.

The Homeland Security Act also provides new champions for the civil service system and merit-based government. An important provision of the new law amends title 5 to create—in each of the 25 departments and major agencies, not just the DHS—the new position of chief human capital officer (CHCO). These officials are to set the workforce development strategies of their agencies and align HRM with their organizations' missions and performance outcomes. The law requires the chief human capital officers to assist agency heads in carrying out the agencies' responsibilities for selecting, developing, training, and managing a high-quality workforce in accordance with merit system principles.

CHCOs are not necessarily the same as human resources directors. Effective human capital management requires interaction and involvement of HR at the top executive levels. Only in rare instances are individuals able to serve as HRM directors and also act effectively as full strategic partners, capable of involving the most senior leadership in addressing the agencies' human capital issues.

The CHCO positions should have professional requirements and competencies not unlike those of the government's chief financial officers or chief information officers. While the CHCO must be a member of the top executive team, simply giving the existing HR director or the assistant secretary for management another hat to wear is not likely to result in more effective human capital management. CHCOs should have a significant oversight role in order to maintain adherence to the merit principles across agency HR policies and practices. This includes work-

ing closely with their respective inspectors general. Achieving top leadership involvement while integrating the merit principles with the corporate core values, requires a very dedicated focus. How agencies designate and use their new CHCO positions will be indicative of their commitment to improving human capital management.

In the final analysis, it is clear that the government has kept its commitment to merit-based systems and decisions. Although significant changes are to be expected as federal agencies experience massive reorganization, changes in our core values are not among them.

*Steve Nelson*

Director, Policy and Evaluation

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## Category Rating

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category. The USDA demonstration used two categories of qualified applicants (eligible and quality), and the new law requires two or more categories to be used. There is no limit to the number of candidates who may be placed in the top category, and with the exceptions noted below, any person in the top category may be selected. If the top category has fewer than three candidates, managers may consider any of the candidates in a merged group composed of the top two categories.

Veterans preference is preserved under category rating. First, absolute preference (“floating to the top”), now granted to qualified vets with at least a 10 percent service-connected disability, will continue. Otherwise, veterans are placed in a category solely on the basis of their qualifications and then have absolute preference over nonveterans in the same category. Because veterans preference eligibles are normally

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assigned to a category based on their qualifications, job-related objections to giving them preference should be reduced. In a 1995 report ("The Rule of Three in Federal Hiring: Boon or Bane?") we noted that veterans were hired at a higher rate under the USDA demonstration project's categorical rating system than under register hiring. Early contractor evaluations of the USDA demonstration project revealed some managerial concerns about veterans' absolute preference, but managers' complaints about referred veterans' qualifications often seemed to be caused by the use of poorly designed assessment criteria to assign applicants to the two categories. Carefully applying valid assessment criteria (something else the Board has long supported) should help minimize concerns that veterans are less qualified than nonveterans in the same category.

As a long-time advocate of the wider use of categorical rating, MSPB is pleased to see this change to federal hiring.

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## Pay Banding in the Federal Government

The establishment of the new Department of Homeland Security, with its authority to design its own human resources system, has raised the possibility that more federal employees will be moving out of the General Schedule and into pay banding arrangements. DHS will have a workforce of about 170,000 employees and the authority to move many or most of them into a pay banding system. About 80,000 employees in agencies with HRM demonstration projects or alternative personnel management systems are already compensated under pay banding systems, some of which have been in place for over 20 years. With many thousands of federal employees already working

under such systems, and the likelihood that many more will be doing so soon, it's useful to know the basics about how federal pay banding, or "broad banding," works.

**Grouping pay ranges.** In pay banding, agencies may collapse the 15 General Schedule grades into a smaller number of pay ranges or bands. For example, an agency could establish four bands encompassing the GS 1–5, the GS 6–11, the GS 12–13, and the GS 14–15 levels. This gives managers more flexibility in pay setting, by creating pay ranges much broader than that of single GS grades. At today's

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rates, for instance, the second band in this example would allow managers in the Washington, DC, area to set pay anywhere from \$28,253 to \$60,405. The number of bands and the way the grades are assigned to the bands can be designed to support the organization's mission, values, and culture.

**Adjusting pay.** Once the pay bands are defined, the agency determines how employees move within and across pay bands. The GS system uses longevity (time-in-grade) and quality step increases to move an employee within a grade, and merit promotion to move an employee to a higher grade. Pay under the GS system also is increased through general, governmentwide pay increases. In pay banding systems, the amount of a pay increase within a band is based on the employee's skills or competencies, job performance, contributions, or similar measures. Monies earmarked in the GS system for within-grade, general, and quality

step increases may become "at risk" incentive pay in a pay banding system, available to be earned by the employees within the band, but not guaranteed. A high performing employee could move to the top salary of a pay band much more quickly than is possible in the GS system. In contrast, a low or marginal employee might get no incentive pay, and only part—or even none—of the general increase. An employee could move to the next higher band through promotion, or even without a promotion, depending on how the pay banding system is defined. These flexibilities allow an agency to manage its workforce by rewarding highly valued behaviors that result in better mission accomplishment.

Another important feature of pay banding systems—in addition to broader pay ranges and more flexible ways to adjust pay—is occupational groupings or career paths. We'll discuss how these fit into pay banding systems in a future *Issues of Merit*.

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## Alternative to Merit Promotion Is Tested

Last year the Board issued a report recommending that managers be given greater authority to promote employees in their organizations without going through formal merit promotion procedures. We made this recommendation because we believe that such procedures often fail to yield benefits that justify the time and resources needed to administer the formal merit promotion process. We also suggested that many organizations could benefit if they were allowed to establish more flexible compensation systems that would enable them to design alternatives to the competitive promotion process.

An ongoing demonstration project at the Air Force Research Laboratory illustrates how innova-

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tive approaches to classification and compensation can improve federal human resources management. This demonstration project features an integrated classification, performance management, and pay banding system.

Under this system, changes in an employee's compensation are based upon his or her contribution to meeting organizational goals. There are six areas in which employees contribute:

- Technical problem solving
- Communications and reporting
- Corporate resource management
- Research and development—business development
- Technology transfer
- Teamwork and leadership

Each employee's contribution is "scored" by a panel of supervisors so that one person is not the sole determinant of an employee's contribution rating. An employee's movement both within a given pay band and even between pay bands is determined by his or her contribution score.

Use of these six critical activities not only provides a better link between pay and performance, it also can give employees a roadmap to advancement—both to higher levels in their current pay band and to the next higher pay band. In other words, the system gives employees a greater opportunity to control their own destinies. Employees who want to advance in the organization know what behaviors are valued by the organization and what they have to do in order to reach higher levels of compensation and higher level positions. Employees who wish to advance can seek opportunities to provide greater value to their organization. When they've demonstrated that value, they can be moved to higher pay bands without the need for formal competitive merit promotion processes.

The rewards for high perform-

ing employees can be significant. The average 2002 pay increase for employees in this demonstration project was 5.8 percent; the largest was 31.8 percent. Just as importantly, employees who have not made significant contributions to organizational performance often choose to work elsewhere, improving productivity and greatly reducing the need for performance-based adverse actions. Perhaps most significantly, employees involved in the demonstration project generally accept this approach to compensation and advancement, and see a clear link between their contributions and their compensation.

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### Who Says You Can't Fire a Poor Performer?

**Y**ou can't fire a poorly performing federal employee." We hear it all the time: politicians say it, the public says it, federal managers say it. But what does the law say?

Federal agencies may demote or remove an employee for unacceptable performance under chapter 43 of title 5 of the United States Code. While most employees may appeal such an action to the Merit Systems Protection Board, the appeal will not succeed if the agency can support its action with substantial evidence that the employee has failed to meet performance standards. MSPB regulations define substantial evidence as the degree of evidence that a reasonable person might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower burden of proof than exists in disciplinary actions for misconduct or in most civil lawsuits.

Not surprisingly, a key component of an action taken for unacceptable performance is the performance standards. These should reflect what agency management wants from the incumbent of a position and should provide a

means to measure the accomplishment of those goals. Agencies have flexibility to develop performance standards, but in a chapter 43 action an agency must show that the employee's performance under one or more critical elements was below the minimally successful level. The critical elements an employee failed to meet must be reasonable, realistic, attainable, and, in the language of the law, "to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria."

Employee performance standards need not be completely objective, but must be precise enough to invoke a general agreement regarding their meaning, and must provide a firm benchmark towards which employees can aim their performance. The degree of objectivity and specificity required in performance standards varies with the position. Positions with greater

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discretion and independence frequently require less objectivity and specificity in their performance standards. Even when the standards fail to clearly communicate management's expectations, the Board will sustain a chapter 43 action if the agency otherwise informed the employee of the specific work requirements. While an employee may challenge the validity of the performance standards, MSPB will strike down

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a standard only if it determines that the agency harmed the employee by abusing its discretion in establishing the standards.

For example, MSPB will not uphold a removal or demotion based on a standard that requires an unreasonably high level of performance. In one such case, the Board found unreasonable a performance standard that required an office automation clerk to make no more than two errors in the completion of documents during her entire rating period. Nor may an agency hold an employee to a standard that requires perfect performance—not a single error during the rating period—unless the agency can show that death, injury, or a breach of security could result from a single failure to fulfill the standard. Finally, where an agency writes a performance standard that describes acceptable performance in terms of what employees should not do, but fails to inform them of what they should do, the agency has crafted an invalid “backward standard.”

This is only an overview of the issues surrounding performance standards in a chapter 43 action before the MSPB. It should be clear, however, that there are some pitfalls awaiting the unwary, and therefore it's always a good idea to consult with agency counsel before beginning an action. In the next *Issues of Merit* we'll examine some issues surrounding the requirement to provide an employee a reasonable opportunity to improve.

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## A Look Into the Crystal Ball?

The states have often been referred to as “laboratories of government.” This aptly describes three states—Florida, Georgia, and Texas—that have made radical reforms to their public employment systems. These reforms are

discussed in “Life after Civil Service Reform: The Texas, Georgia, and Florida Experiences,” a report from the IBM Endowment for the Business of Government. (You can find the full report at [http://endowment.pwcglobal.com/pdfs/Walters\\_report.pdf](http://endowment.pwcglobal.com/pdfs/Walters_report.pdf).) In preparing the report, the author interviewed managers and personnel officials in each of these states about their experiences before and after reform. The states' experiences offer some valuable lessons for the federal government as it implements new flexibilities and explores further reforms.

**The Reforms.** The reforms covered almost all aspects of employment, from recruitment to selection to pay to firing. These states discarded most, if not all, centralized systems and rules. For example, Florida replaced its grade-and-step pay systems with pay bands; Georgia eliminated written tests and ranking for most upper-level positions; and Texas abolished seniority. Most notably, all three states moved in the direction of “at will” employment, greatly reducing the extent of due process afforded an employee who is disciplined or removed.

**The Effects.** Managers and personnel officials agree that reform has enabled them to simplify human resources processes and make more timely decisions on matters such as hiring, pay, and discipline. However, “faster” does not mean arbitrary or nonmerit-based. Personnel directors acknowledge that reform does not relieve agencies of their legal responsibilities (such as equal employment opportunity) or of their obligation to treat employees fairly. And the increasing complexity of government work—coupled with a growing emphasis on results and performance—has reduced the likelihood of any return to a spoils system:

“... immediate past political history would suggest that good management is a much more solid foundation for elective longevity than

generous padding of payrolls with patronage employees. Any new governor with plans to fire hundreds or thousands of state employees and replace them with cronies would pursue such a strategy at considerable political risk.”<sup>1</sup>

Not surprisingly, then, the vast majority of employees who held jobs before reform continue to do so after reform in all three states. So fears of chaos, mass firings, or rampant abuse appear largely unfounded. But not completely unfounded, perhaps: in one state, union officials claim that high-salaried senior employees are being terminated to reduce labor costs.

### Implications of Reform.

Have reforms been a success? Many managers and human resources officials seem to think so:

“Ask almost any state government manager in almost any of the other 47 states about what it's like to find and hire good people, and what you'll invariably hear is a long list of complaints about the complex, convoluted, and snail'space system in place. Ask personnel officials or hiring authorities in Texas, Georgia, or Florida how they like their style of personnel management, and you'll hear how relieved they are not to have to suffer the dictates of a highly structured, centralized, rule-driven personnel system.”<sup>2</sup>

Nevertheless, it is too soon to say that the reforms of these states should be adopted by other governments. We'll talk about why in our next *Issues of Merit*, when we take a look at some of the yet-unanswered questions about the long-term effects of reform.

<sup>1</sup> Walters, Jonathan, “Life After Civil Service Reform: The Texas, Georgia, and Florida Experiences,” IBM Endowment for the Business of Government, October 2002, p. 43.

<sup>2</sup> Ibid, p. 35.



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## Selected Publications from the Office of Policy and Evaluation\*

- ☐ Making the Public Service Work: Recommendations for Change
- ☐ Assessing Federal Job Seekers in a Delegated Examining Environment
- ☐ The Federal Merit Promotion Program: Process vs. Outcome
- ☐ The U.S. Office of Personnel Management in Retrospect: Achievements and Challenges After Two Decades
- ☐ Growing Leaders: The Presidential Management Intern Program
- ☐ Competing for Federal Jobs: Job Search Experiences of New Hires
- ☐ Restoring Merit to Federal Hiring: Why Two Special Hiring Programs Should Be Ended
- ☐ The Role of Delegated Examining Units: Hiring New Employees in a Decentralized Civil Service
- ☐ Federal Supervisors and Poor Performers
- ☐ Civil Service Evaluation: the Evolving Role of the U.S. Office of Personnel Management
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- ☐ The Changing Federal Workplace: Employee Perspectives
- ☐ Adherence to the Merit Principles in the Workplace: Federal Employees' Views
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## Selected Current Projects

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|--|---|
| <input type="checkbox"/> The use of interviews in selection          | <input type="checkbox"/> Federal government recruiting  |
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\* Most of these reports can be downloaded from the **STUDIES** page of the MSPB website: [mspb.gov](http://mspb.gov)

"Issues of Merit" provides findings and recommendations drawn from MSPB research on topics and issues relevant to the effective operation of the federal merit systems and the significant actions of the Office of Personnel Management.